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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ANTUNA, Defendant and Appellant.	H042678 (Santa Clara County Super. Ct. No. C1084548)

Pursuant to a plea agreement, defendant Joseph Antuna pleaded guilty to murder (count 1) (Pen. Code, §§ 187, 189)[1] and two counts of attempted murder (counts 2 & 3) (§§ 187, 664, subd. (a)); admitted allegations that those attempted murders were willful, deliberate, and premeditated; admitted gang and firearm allegations; and waived his appellate rights. In exchange, defendant received a total term of 50 years to life for the murder and the associated firearm enhancement (§ 12022.53, subd. (d)) and concurrent sentences on the remaining two counts. Defendant was 21 years old when he committed those offenses.

The passage of Senate Bill No. 620 (20l7-2018) (Sen. Bill No. 620) amended section 12022.53, subdivision (h) (hereafter 12022.53(h)), effective January 1, 2018. (Stats. 2017, ch. 682, § 2, p. 5106; Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a).) Prior to this amendment, section 12022.53(h) and the predecessor statute

[1] All further statutory references are to the Penal Code unless otherwise specified.

mandated imposition of the section's firearm enhancements.[2] This was the law when defendant committed his crimes and when he was sentenced. Since its amendment in 2017, section 12022.53(h) has provided: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

On appeal defendant asserts that the judgment should be reversed to permit the trial court to retroactively exercise its discretion to strike the firearm enhancements as now permitted by section 12022.53(h). Defendant maintains that this issue is not barred by his general waiver of his right to appeal or by the lack of a certificate of probable cause.[3] Defendant further asserts that since the youth offender parole hearing statutes now apply to him, the case should be remanded for a "*Franklin* hearing" (see *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*)) to preserve mitigating evidence tied to his youth. He contends that failure to order such a remand would result in a violation of his rights to due process and equal protection under the law.

We find that neither defendant's general waiver of his right to appeal nor the lack of a certificate of probable cause bars this court from proceeding with this appeal and reaching the issues that he now raises. Since we conclude that the Legislature intended section 12022.53(h), as amended, to apply retroactively, we will remand the case to allow the trial court to consider whether to exercise its discretion under that provision. In addition, we agree that a *Franklin* hearing should be held following remand.

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[2] Until the 2017 amendment, section 12022.53(h) provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (Stats. 2010, ch. 711, § 5, p. 4041; see Stats. 2006, ch. 901, § 11.1, p. 7077 [predecessor § 12022.53(h)].)

[3] Defendant's motion for relief from default and for leave to file an amended notice of appeal that includes a statement of reasonable grounds and a request for a certificate of probable cause is denied. (See Cal. Rules of Court, rules 8.60(d), 8. 304(b), 8.308(a); *People v. Mendez* (1999) 19 Cal.4th 1084, 1098-1099.)

I

Procedural History

Defendant's motion to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) was granted on June 20, 2012.

A first amended information (hereafter information) charged defendant with three counts[4] committed on or about June 25, 2010: murder of C.L. with malice aforethought (§ 187) (count 1) and attempted murder of I.C. and C.C. (§§ 187, 664, subd. (a)) (counts 2 & 3). The information alleged that the attempted murders charged in counts 2 and 3 were committed willfully, deliberately, and with premeditation. It alleged that all of the charged offenses were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C) [10-year enhancement]) and that the attempted murders charged in counts 2 and 3 were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(5) (15-year minimum parole eligibility term). As to counts 1 and 3, the information alleged that defendant personally and intentionally discharged a firearm and proximately caused great bodily injury or death within the meaning of 12022.53, subdivision (d) (consecutive 25-years-to-life enhancement), and as to count 2, the information alleged that defendant was a principal and a principal had intentionally and personally discharged a firearm and proximately caused great bodily injury within the meaning of section 122022.53, subdivisions (d) and (e)(1) (consecutive 25-years-to-life enhancement).

At a change-of-plea hearing on May 6, 2015, the prosecutor announced that defendant would be pleading guilty to all charges against him in the information and admitting all associated allegations as part of a plea agreement. The prosecutor informed the court that the parties had agreed that the total sentence on count 1 would be 50 years to life, which included a 25-years-to-life term for first degree murder and a 25-years-to-

[4] A codefendant was charged with six counts.

life term for the firearm enhancement and that the sentences on counts 2 and 3 would run concurrently.

Defendant pleaded guilty to murder (count 1).[5] As to this crime, he also admitted the criminal street gang enhancement allegation (§ 186.22, subd. (b)(1)(C) [10-year enhancement]) and the firearm enhancement allegation pursuant to section 12022.53, subdivision (d). He also pleaded guilty to two counts of attempted murder (counts 2, 3) (§§ 187, 664, subd. (a)), and as to those counts he admitted that the offenses were willful, deliberate, and premeditated (see §§ 189, 664, subd. (a)) and admitted the criminal street gang allegations pursuant to section 186.22, subdivision (b)(5)[6] and the firearm enhancement allegations.

At the time of sentencing on June 5, 2015, the trial court imposed a total sentence of 50 years to life. The total term on count 1 included a term of 25 years to life for murder[7] (§ 190, subd. (a)) plus a consecutive 25-years-to-life firearm enhancement (§ 12022.53, subd. (d)). On both counts 2 and 3, the court imposed concurrent terms of 40 years to life, which each included a 15-years-to-life term for attempted murder

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[5] The trial court asked defendant, "Then what is your plea to count one, that on or about June 25th of 2010 in the County of Santa Clara, State of California, you violated Penal Code Section 187, murder, in that you did unlawfully and with malice aforethought kill [C.L.], a human being? Defendant answered, "Guilty."

[6] Subdivision (b)(5) of section 186.22 "serves as an alternate penalty provision" (*People v. Fuentes* (2016) 1 Cal.5th 218, 224), "imposes a minimum prison confinement of 15 years before a defendant is eligible for parole, [and] applies when the underlying felony by its own terms provides for a life sentence." (*Ibid*.)

[7] At the sentencing hearing, defendant protested that the count 1 offense was not first degree murder. The trial court indicated that proceedings were beyond that point. On appeal, defendant does not argue that the abstract of judgment incorrectly reflects the count 1 crime to which he pleaded. We note that in *People v. Hester* (2000) 22 Cal.4th 290, the Supreme Court stated: "Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.]" (*Id*. at p. 295.)

(see *ante*, fn. 6) plus a consecutive 25-years-to-life firearm enhancement. The court said that as to each of the three counts, it was striking the 10-year enhancement (§ 186.22, subd. (b)(1)(C)) pursuant to section 186.22, subd. (g).[8]

Defendant filed a notice of appeal and requested a certificate of probable cause. The request merely stated: "For reasons that were stated in court, defendant's plea was involuntary and he received ineffective assistance of counsel."[9] The request was denied.

II

Discussion

A. *Firearm Enhancements Imposed under Section 12022.53*

Defendant argues that the judgment should be reversed to permit the trial court to exercise its discretion under section 12022.53(h), as amended effective January 1, 2018. (See Stats. 2017, ch. 682, § 2, p. 5106; Cal. Const., art. IV, § 8, subd. (c); Gov. Code, § 9600, subd. (a).) Defendant maintains that he may raise this issue even though he orally waived his right to appeal when he entered his pleas and admissions and did not obtain a certificate of probable cause.

1. *Waiver of Right to Appeal*

Defendant argues that the scope of his general waiver of his right to appeal did not extend to "prospective sentencing errors" and that therefore we may reach the merits of his contention that amended section 12022.53 retroactively applies to him. Defendant insists that his appellate waiver did not encompass such errors because "the trial court did not sufficiently advise [him] of his right to appeal," he did not specifically waive future sentencing errors, and he "did not knowingly and intelligently waive [his] appellate rights with respect to prospective sentencing errors,"

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[8] Defendant admitted a gang enhancement within the meaning of section 186.22, subdivision (b)(1)(C), as to only count 1.

[9] "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' " (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46; see *People v. Espinoza* (2016) 1 Cal.5th 61, 75.)

a. *Background*

In a letter to the Deputy District Attorney (D.D.A.) Miguel Valdovinos, dated April 27, 2015, defendant, who was representing himself, stated that he was contacting the D.D.A. to settle the case. In the letter, defendant stated in part, "I want to get this case over with. If this requires my pleading guilty and waiving my right to appeal, then I will accept that along with whatever amount of time you feel is reasonable."

At the change of plea hearing on May 6, 2015, the prosecutor told the court that the terms of the parties' plea agreement included a waiver of appellate rights. Before accepting defendant's pleas and admissions, the court advised defendant of the constitutional rights that he would give up by pleading guilty, elicited defendant's waiver of those rights, and informed defendant of the consequences of such pleas and admissions. Specifically as to the right to appeal, the trial court told defendant, "And you're also, by this plea, waiving any right to appeal. Do you understand that?" Defendant replied, "Yeah."

b. *Law Governing Waiver of Right to Appeal*

"Just as a defendant may affirmatively waive constitutional rights to a jury trial, to confront and cross-examine witnesses, to the privilege against self-incrimination, and to counsel as a consequence of a negotiated plea agreement, so also may a defendant waive the right to appeal as part of the agreement. [Citations.]" (*People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*).) "To be enforceable, a defendant's waiver of the right to appeal must be knowing, intelligent, and voluntary. [Citations.] Waivers may be manifested either orally or in writing. [Citation.]" (*Ibid.*)

The Supreme Court in *Panizzon* agreed that *People v. Sherrick* (1993) 19 Cal.App.4th 657 and *People v. Vargas* (1993) 13 Cal.App.4th 1653 (*Vargas*) "generally support[ed] the proposition that a defendant's general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing errors occurring subsequent to the plea." (*Panizzon, supra,* 13 Cal.4th at

p. 85, fn. ommitted.) The Supreme Court pointed out, however, that "the defendants in those decisions were attempting to appeal sentencing issues that were left *unresolved* by the particular plea agreements involved." (*Ibid*.) The court explained that "[i]n each of those decisions, the appellate court viewed the sentencing issue as not being within the contemplation and knowledge of the defendant at the time the waiver was made and so refused to extend thereto a general waiver of the right to appeal." (*Ibid*.)

In *Panizzon*, the Supreme Court observed that "the sentence imposed by the court was neither unforeseen nor unknown at the time defendant executed the Waiver and Plea agreement" (*Panizzon*, *supra*, 13 Cal.4th at p. 86) and that "the essence of [the] defendant's claim [was] that his sentence [was] disproportionate to his level of culpability [citation], a factor that . . . was known at the time of the plea and waiver." (*Ibid*.) In addition, the express terms of defendant Panizzon's waiver "specifically extended to any right to appeal [the specified] sentence." (*Ibid*.) The Supreme Court concluded that the defendant was seeking "appellate review of an integral element of the negotiated plea agreement, as opposed to a matter left open or unaddressed by the deal." (*Ibid*.)

It is generally understood that a defendant's "general waiver of appeal rights ordinarily includes error occurring before but not after the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error. (*In re Uriah R*. (1999) 70 Cal.App.4th 1152, 1157.) Thus, a waiver of appeal rights does not apply to ' "possible future error" [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.' [Citations.]" (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

c. *The Validity of Defendant's General Waiver of His Right to Appeal*

Defendant now claims that "the trial court did not sufficiently advise [him] of his right to appeal" and he "did not knowingly and intelligently waive his appellate rights with respect to prospective sentencing errors." He also asserts that "[b]ecause [he] did

not knowingly and intelligently [waive] the right to appeal future sentencing errors, the appeal cannot in any sense be construed as an attack on the validity of the plea."

To the extent defendant is asserting that his waiver of the right to appeal was unenforceable because it was not knowing and intelligent, defendant is in effect challenging the validity of his plea. We cannot reach this assertion in the absence of a certificate of probable cause.

"[I]ssues going to the validity of a plea require compliance with section 1237.5. [Citation.] . . . [A] certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]" (*Panizzon, supra*, 13 Cal.4th at p. 76.) "[A] defendant who waives the right to appeal as part of a plea agreement must obtain a certificate of probable cause to appeal on any ground covered by the waiver, regardless of whether the claim arose before or after the entry of the plea. Absent such a certificate, the appellate court lacks authority under California Rules of Court, rule 8.304(b) to consider the claim because it is in substance a challenge to the validity of the appellate waiver, and therefore to the validity of the plea." (*People v. Espinoza* (2018) 22 Cal.App.5th 794, 797 (*Espinoza*).)

As Justice Baxter explained in his concurring opinion in *People v. Buttram* (2003) 30 Cal.4th 773 (*Buttram*), "[a]n attempt to appeal the *enforceability* of the *appellate waiver itself* (for example, on grounds that it was not knowing, voluntary, and intelligent, or had been induced by counsel's ineffective assistance) would not succeed in circumventing the *certificate* requirement. This is because, however important and meritorious such a challenge might be, it too would manifestly constitute an *attack on the plea's validity*, thus requiring a certificate in any event." (*Id.* at p. 793, conc. opn. of Baxter, J.).)

d. *The Scope of Defendant's General Waiver of His Right to Appeal*

Defendant also contends that "the scope of [his] appellate waiver did not extend to sentencing issues that arose after the plea" and that consequently the waiver does not bar

him from asking this court to remand the case to permit the trial court to exercise its discretion under section 12022.53(h), as amended. This court has concluded "[b]ased on our review of the relevant authorities, [that] a certificate of probable cause is *not* required [to resolve] the issue of *whether* the defendant's appellate claim falls within the scope of an appellate waiver." (*People v. Becerra* (2019) 32 Cal.App.5th 178, 188 (*Becerra*), review den., May 22, 2019, S254821.)

" 'A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.]' (*People v. Shelton* (2006) 37 Cal.4th 759, 767 (*Shelton*).) Likewise, '[b]ecause waivers of appellate rights are ordinarily found in the context of a plea bargain, the scope of the waiver is approached like a question of contract interpretation—to what did the parties expressly or by reasonable implication agree? [Citations.]' (*In re Uriah R.* (1999) 70 Cal.App.4th 1152, 1157.)" (*Becerra*, *supra*, 32 Cal.App.5th at pp. 188-189.) The fundamental goal in interpreting a plea agreement is to effectuate " 'the mutual intention of the parties' [Citation.]" (*Shelton*, *supra*, at p. 767.)

Ordinarily, a general waiver of the right to appeal does not encompass sentencing errors outside of the defendant's contemplation and knowledge at the time of the negotiated plea and waiver. (See *Vargas*, *supra*,13 Cal.App.4th at pp. 1661-1662 [alleged error in calculating conduct credits]; cf. *Panizzon*, *supra*, 13 Cal.4th at pp. 85-86.) We conclude that defendant's claims on appeal are outside the scope of his waiver of his right to appeal for the following reasons. First, a future change in sentencing law may be deemed incorporated into a plea agreement if the Legislature or the electorate so intends. (See *Doe v. Harris* (2013) 57 Cal.4th 64, 66, 71, 73-74 (*Doe*); *Harris v. Superior Court* (2016) 1 Cal.5th 984, 990-992; see also *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078 (*Baldivia*).) Second, defendant's waiver of his appellate rights

was a general waiver that did not mention sentencing at all.[10] Third, the 2017 amendment of section 12022.53(h) was outside of defendant's contemplation and knowledge at the time of his negotiated plea and waiver in 2015. (See *People v. Wright* (2019) 31 Cal.App.5th 749, 753-754 [defendant's waiver of the right to appeal from a stipulated sentence pursuant to a plea bargain did not "waive the right to appeal future sentencing error based on a change in the law of which he was unaware at the time he entered his plea"]; but see *People v. Barton* (2019) 32 Cal.App.5th 1088, review granted June 19, 2019, S255214[11].) In addition, at the time of defendant's plea and waiver, the possibility of a *Franklin* hearing pursuant to *Franklin*, *supra*, 63 Cal.4th 261 was also outside of defendant's contemplation and knowledge since that case had not yet been decided and under then existing law he was not entitled to a youth offender parole hearing. (See Stats. 2013, ch. 312, §§ 3,4, 5, pp. 2523-2525.)

Accordingly, defendant's general waiver of the right to appeal does not render his claims not cognizable on appeal.

2. *Certificate of Probable Cause Requirement*

Defendant acknowledges that "the plea agreement included an agreed-upon sentence of 50 years to life." However, he asserts that there was no need for him to obtain a certificate of probable cause. Citing *Doe*, *supra*, 57 Cal.4th at pp. 70-71, 73-74,

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[10] The Supreme Court has indicated that a "general waiver" means "a waiver that is nonspecific, e.g., 'I waive my appeal rights' or 'I waive my right to appeal any ruling in this case.' " (*Panizzon*, *supra*, 13 Cal.4th at p. 85, fn. 11.) In *Panizzon*, the waiver was not a general waiver in that the written waiver and plea form initialed and signed by the defendant stated, "I hereby waive and give up my right to appeal from the sentence I will receive in this case." (*Id*. at p. 82.)

[11] The Supreme Court has limited review in *Barton* to the following issue: "Does a waiver of the right to appeal, included as part of a plea bargain for a stipulated sentence, bar an appeal of the sentence imposed if newly enacted legislation would otherwise be available to enable the appellant to obtain a remand for resentencing under *In re Estrada* (1965) 63 Cal.2d 740?" (<https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2283754&doc_no=S255214&request_token=NiIwLSIkTkw4W1ApSCM9WENIIDw0UDxTJiNOTztSMCAgCg%3D%3D> [as of Jul. 29, 2019].)

he contends that his claim under section 12022.53(h), as amended after his negotiated plea, does not "call into question" the validity of his negotiated plea because "the plea agreement itself incorporated the newly-enacted [*sic*] law" (italics omitted). He maintains that the parties' plea agreement should be interpreted to include the trial court's recently acquired discretion to strike the firearm enhancements under section 12022.53(h). Defendant cites *People v. Hurlic* (2018) 25 Cal.App.5th 50, 57 (*Hurlic*) and *Baldivia, supra,* 28 Cal.App.5th 1071in support of his position.

"In determining whether section 1237.5 applies to a challenge of a sentence imposed after a plea of guilty or no contest, courts must look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] [T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5. [Citation.]" (*Panizzon, supra,* 13 Cal.4th at p. 76.) "The parties to a plea agreement are free to make any lawful bargain they choose, and the exact bargain they make affects whether a subsequent appeal, in substance, is an attack on the validity of the plea." (*Buttram, supra,* 30 Cal.4th at p. 785.)

" 'When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.' [Citations.]" (*Panizzon, supra,* 13 Cal.4th at p. 80.) Ordinarily, "a challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself" (*id*. at p. 79) and "thus requires a certificate of probable cause. [Citation.]" (*Shelton, supra,* 37 Cal.4th at p. 766.)

However, the Supreme Court has "made clear that where the terms of the plea agreement leave issues open for resolution by litigation, appellate claims arising within the scope of that litigation do not attack the validity of the plea, and thus do not require a certificate of probable cause." (*Buttram, supra,* 30 Cal.4th at p. 783.) Thus, postplea

claims, including sentencing issues, that do not challenge the validity of the plea do not need to meet the certificate requirement. (See *People v. Cuevas* (2008) 44 Cal.4th 374, 379.) "In other words, the question is whether defendant 'seeks only to raise [an] issue[ ] reserved by the plea agreement, and as to which he did not expressly waive the right to appeal.' [Citations.]" (*Id.* at p. 381.)

Defendant Hurlic pleaded no contest to a count of attempted murder and admitted a 20-year enhancement allegation based on his personal discharge of a firearm (§ 12022.53, subd. (c)) in exchange for a 25-year sentence. (*Hurlic, supra,* 25 Cal.App.5th at pp. 53-54; see § 190, subd. (a).) On appeal, the defendant argued, similar to the argument that defendant makes here, that he was "entitled to ask the trial court to exercise its newfound discretion to strike the 20-year firearm enhancement" under section 12022.53(h) as amended after "the trial court imposed the agreed-upon sentence of 25 years in prison." (*Hurlic, supra,* at p. 54.)

In *Hurlic,* a division of the Second Appellate District perceived that two lines of authority were in irreconcilable conflict and it was necessary to decide which line prevailed. (*Hurlic, supra,* 25 Cal.App.5th at pp. 55-56.) The first line of authority established that a certificate of probable cause was required where a plea agreement provided for a specific, agreed-upon sentence and a defendant challenged the specified sentence because such a claim was " '*in substance* a challenge to the validity of the plea' (*Panizzon,* at p. 76, original italics)." (*Id.* at p. 56.) The appellate court in *Hurlic* recognized, however, that "where the parties agree to any sentence at or beneath an agreed-upon maximum, that 'agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority' do not attack the validity of the plea and 'will be reviewable on appeal' without a certificate of probable cause. (*Buttram* at pp. 790-791.)" (*Ibid.*)

The second line of authority raised in *Hurlic* was *Estrada*, *supra*, 63 Cal.2d 740 (*Estrada*) and its progeny, which established that in the absence of indications of contrary intent, courts presumptively infer that the legislative body intended an ameliorative criminal law to retroactively apply to all nonfinal judgments. (See *Hurlic*, *supra*, 25 Cal.App.5th at p. 56; *Estrada*, *supra*, at pp. 744-745.) The court in Hurlic decided that the *Estrada* line of authority regarding retroactivity "trump[ed]" the first line of authority requiring a certificate of probable cause to challenge an agreed-upon sentence. (*Hurlic*, *supra*, at p. 57.)

The appellate court in *Hurlic* concluded that the defendant was not required to obtain a certificate of probable cause for three reasons. (*Hurlic*, *supra*, 25 Cal.App.5th at pp. 57-59.) The first was the general rule set forth in *Doe*, *supra*, 57 Cal.4th 64, 66. " '[T]he general rule in California is that the plea agreement will be " 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.' " ' [Citation.]" (*Hurlic*, *supra*, at p. 57.) The court in *Hurlic* reasoned that "[b]ecause [the] defendant's plea agreement does not contain a term incorporating only the law in existence at the time of execution, defendant's plea agreement will be 'deemed to incorporate' the subsequent enactment of Senate Bill No. 620 (2017-2018 Reg. Sess.), and thus give defendant the benefit of its provisions without calling into question the validity of the plea." (*Ibid.*, fn. omitted.)

The appellate court's second reason for finding no certificate was required was that "dispensing with the certificate of probable cause requirement in the circumstances present here better implement[ed] the intent behind that requirement" to screen out frivolous appeals challenging negotiated pleas. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 57.) Third, the court determined that since newly amended section 12022.53(h) conflicted with section 1237.5, the former prevailed because it was the later-enacted and more specific of the two provisions. (*Hurlic*, *supra*, at p. 58.) The court held that a certificate

of probable cause is not required where a defendant's challenge to an agreed-upon sentence is based upon a statute that retroactively grants discretion to the trial courts to "waive a sentencing enhancement that was mandatory at the time it was incorporated into the agreed-upon sentence." (*Id.* at p. 53.)

In *Baldivia*, this court reached the same result as *Hurlic* but found that the "first reason" given in that decision was "dispositive." (*Baldivia, supra*, 28 Cal.App.5th at p. 1077.) Defendant Baldivia's pleas and admissions, including admissions of firearm enhancement allegations under section 12022.53, were "entered in exchange for an agreed prison sentence . . . and the dismissal of other counts and enhancement allegations." (*Baldivia, supra,* at p. 1074.) On appeal, the defendant contended that he was entitled to a remand for a hearing in juvenile court under Proposition 57, and if transferred to adult criminal court, "a resentencing hearing at which the trial court may exercise its newly granted discretion to strike the firearm enhancement." (*Baldivia, supra,* at p. 1074.)

In concluding that defendant Baldivia did not need a certificate of probable cause to raise those contentions, we recognized that under *Doe* and *Harris*, "a plea agreement is deemed to incorporate subsequent changes in the law so long as those changes were intended by the Legislature or the electorate to apply to such a plea agreement." (*Baldivia, supra*, 28 Cal.App.5th at p. 1078.) We noted that in those two cases, "the changes in the law were expressly intended to apply retroactively." (*Ibid.*) We also observed that the California Supreme Court had applied *Estrada*'s reasoning in *People v. Superior Court (Lara*) (2018) 4 Cal.5th 299 to conclude that "Proposition 57 implicitly incorporated this inference of retroactivity because it did not state otherwise." (*Baldivia, supra,* at p. 1079.) We noted that "Senate Bill No. 620 also did not state otherwise, and in fact expressly contemplated that it would have retroactive effect since it provided that this newly granted discretion would apply at any 'resentencing' proceeding." (*Ibid.*)

This court reasoned in *Baldivia*: "While the analysis in *Lara*, unlike that in *Harris*, did not depend on express indications of the electorate's intent, but rather was premised on the implication that the electorate had incorporated the "inference of retroactivity" by not expressly indicating otherwise, the result in both cases was that the change in the law was deemed to be retroactive. We can see no reason why this distinction should alter the impact on plea agreements. If the electorate or the Legislature expressly or implicitly contemplated that a change in the law related to the consequences of criminal offenses would apply retroactively to all nonfinal cases, those changes logically must apply to preexisting plea agreements, since most criminal cases are resolved by plea agreements. It follows that defendant's appellate contentions were not an attack on the validity of his plea and did not require a certificate of probable cause." (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1079.)

We recognize that a split of opinion has now developed among the Courts of Appeal regarding whether a defendant who pleaded guilty or nolo contendere pursuant to a plea agreement that provides for a specified sentence must obtain a certificate of probable cause before arguing on appeal that an ameliorative law retroactively applies to potentially alter the agreed-upon sentence. (Cf. *People v. Stamps* (2019) 34 Cal.App.5th 117, review granted, Jun. 12, 2019, S255843 [remand to allow court to exercise its discretion to strike five-year serious felony enhancement under recently amended law]; *Baldivia*, *supra*, 28 Cal.App.5th 1071; *Hurlic*, *supra*, 25 Cal.App.5th 50 with *People v. Galindo* (2019) 35 Cal.App.5th 658 [dismissing appeal for failure to obtain a certificate of probable cause]; *People v. Fox* (2019) 34 Cal.App.5th 1124, [same]; *People v. Kelly* (2019) 32 Cal.App.5th 1013 [same], review granted, Jun. 12, 2019, S255145.)

In this case, unlike *Baldivia* where the Attorney General conceded the merit of the defendant's contentions (*Baldivia*, *supra*, 28 Cal.App.5th at p. 1074), the Attorney General argues in this case that a certificate of probable cause is required to reach defendant's claim as to the firearm enhancements because the agreed-upon sentence of

50 years to life was integral to the plea agreement. Nevertheless, we agree with *Baldivia* that since a plea agreement generally incorporates future changes in the law that the legislative body intends to apply retroactively to the parties, defendant is not attacking the validity of his plea when he argues that section 12022.53, as amended, retroactively applies to his case and requires a remand for resentencing. We hold that a certificate of probable cause was not required to raise this argument on appeal.

3. *Retroactive Application of Section 12022.53*

Defendant asserts that section 12022.53(h) retroactively applies to his convictions based on (1) its statutory language which makes it applicable at any "resentencing" proceeding and (2) *Estrada*'s presumptive inference of retroactivity, which applies since the People have not rebutted it. (See *Estrada*, *supra*, 63 Cal.2d 740.) Under the logic of *Baldivia*, we agree.

Undoubtedly, section 12022.53(h), as amended, was intended to eliminate mandatory firearm enhancements so that relief would be available to deserving defendants and allow trial courts at the time of sentencing to exercise their discretion to strike or dismiss a firearm enhancement in the interests of justice pursuant to section 1385. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 620 (2017-2018 Reg. Sess.) as amended June 15, 2017, pp. 1, 3-4, 6; Sen. 3d Reading, Analysis of Sen. Bill No. 620 (2017-2018 Reg. Sess.) as amended June 15, 2017, pp. 1-3; Assem. Com. on Appropriations, Rep. on Sen. Bill No. 620 (2017-2018 Reg. Sess.) as amended June 15, 2017, pp. 1-2.) We see nothing in the amendment itself or its legislative history to rebut the inference that the Legislature intended section 12022.53(h), as amended, to apply retroactively to all nonfinal judgments or to indicate that the parties' plea agreement did not fall within *Doe*'s general rule. The People have not argued, or shown by citation to the appellate record, that the parties affirmatively agreed or implicitly understood that defendant would be unaffected by a future change in the law. (See *Doe*, *supra*, 57 Cal.4th at p. 71.)

In addition, the People have not argued, and the record does not demonstrate, that the trial court would not have, in any event, stricken or dismissed any of the firearm enhancements if it had had the discretion to do so at the time of defendant's sentencing. (Cf. *People v. McVey* (2018) 24 Cal.App.5th 405, 418-419 [no remand to exercise discretion under section 12022.5, subdivision (c), to strike or dismiss firearm enhancement]; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no remand to exercise discretion to strike Three Strikes conviction].) Consequently, we will remand the case for a resentencing hearing at which the trial court may consider whether to strike or dismiss the firearm enhancements, as now permitted by section 12022.53(h). (See *Baldivia*, *supra*, 28 Cal.App.5th at p. 1079.)

B. *Remand for a* Franklin *Hearing*

When defendant was sentenced on June 5, 2015, the recently enacted youth parole hearing statutes did not apply to him because he was not under 18 years of age at the time of his offenses. (See Stats. 2013, ch. 312, §§ 3, 4, 5, pp. 2523-2525.) Those statutes were later amended to apply to older offenders like him. (See Stats. 2015, ch. 471, §§ 1, 2, pp. 4174-4176; Stats. 2017, ch. 684, §§ 1.5, 2.5 pp. 5123-5126.)

In *Franklin*, the California Supreme Court determined that an offender who would be entitled to a hearing under youth offender parole hearing statutes should be afforded a "sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing."[12] (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Defendant asks this court to remand this case for a *Franklin* hearing to give him an opportunity to develop a record of mitigating evidence relevant to his future youth offender parole hearing. The People do not object to such remand.

[12] Although section 3051"excludes several categories of juvenile offenders from eligibility for a youth offender parole hearing" (*Franklin*, *supra*, 63 Cal.4th at p. 277), there has been no suggestion that defendant falls within any of those exclusions. (See § 3051, subd. (h).)

In *Franklin*, the Supreme Court found it was "not clear whether Franklin had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Consequently, it "remand[ed] the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid*., see *id*. at pp. 286-287.) It provided the following guidance: "If the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Id*. at p. 284.)

The foregoing proceeding is commonly referred to as a "*Franklin* hearing." (See *In re Cook* (2019) 7 Cal.5th 439, 459.) As indicated, it "derives from the statutory provisions of sections 3051 and 4801. [Citations.]" (*Ibid*.) Section 3051, subdivision (a)(1), currently provides in relevant part: "A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense." The section defines "controlling offense" to mean "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment."[13] (§ 3051, subd. (a)(2)(B).) Section 3051, subdivision (b)(3), specifies:

[13] The Supreme Court in *Franklin* pointed out: "[T]he trial court sentenced Franklin to a mandatory term of 25 years to life under section 190 for first degree murder and to a consecutive mandatory term of 25 years to life under section 12022.53 on the firearm enhancement. Either the homicide offense or the firearm enhancement could be

"A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." Section 4801, subdivision (c), states: "When a prisoner committed his or her controlling offense, as defined in subdivision (a) of Section 3051, when he or she was 25 years of age or younger, the board, in reviewing a prisoner's suitability for parole pursuant to Section 3041.5, shall give great weight to the diminished culpability of youth as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

We agree a *Franklin* hearing is warranted. Consequently, it is unnecessary to reach defendant's constitutional contentions.

DISPOSITION

We reverse the judgment for the limited purpose of resentencing. Upon remand, the court shall hold a resentencing hearing at which it may exercise its discretion to strike the firearm enhancements. If the court strikes any of those enhancements, it shall resentence defendant. If it declines to strike any of the enhancements, it shall reinstate the judgment. The court shall also determine whether defendant had an adequate opportunity to make a record of information that will be relevant to his eventual youth offender parole hearing, and, if not, to allow the parties the opportunity to make a record of such information pursuant to *Franklin, supra*, 63 Cal.4th 261.

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considered the 'controlling offense' under section 3051, subdivision (a)(2)(B)." (*Franklin, supra*, 63 Cal.4th at p. 279.)

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ELIA, J.

WE CONCUR:

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PREMO, ACTING P. J.

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GROVER, J.

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